No. 12398

United States Court of Appeals

FOR THE NINTH CIRCUIT

COVEY GAS AND OIL COMPANY,
a corporation

Appellant,

vs.

NORELL T. CHECKETTS and TWILA CHECKETTS
husband and wife,

Appellees.

Brief of Appellees

Appeal from the United States District Court for the District of Idaho, Eastern Division

HONORABLE CHASE A. CLARK, *Judge*

B. W. Davis and L. F. Racine, Jr.,
Attorneys for Appellees
Pocatello, Idaho

GATEWAY PRINTERS -- POCATELLO

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Brief of Appellees

STATEMENT OF CASE

In addition to the statment of the case outlining the facts as set forth in appellant's brief (pp. 4 to 6) the testimony clearly shows a violation of Idaho Code Annotated, Section 48-1101:

> "It shall be unlawful for anyone to drive any motor vehicle past a truck, bus or other vehicle being used by a school district to transport children to or from school, at a time when anyone is getting on or off said truck, bus or other vehicle."

And that the appellant's driver was proceeding on a bright, sunshiny day with an unobstructed and clear view of the stopped school bus for at least half a mile. T 29-30

Also, that the driver, Ralph L. Bowman was driving an oil truck or tanker at a speed of from 35 to 50 miles per hour T. 30 T. 123 and that at the point on the highway where the accident occurred, the highway was widened on the easterly side thereof or on the right hand side of said truck driver's lane of traffic, and that there was a flat or level approach to the highway at what is nown as Merridell Park. T. 134.

Also, that there were at least some four automobiles or motor vehicles stopped directly behind the school bus waiting for the children to alight therefrom and that the oil truck driven by Ralph L. Bowman was the only motor vehicle approaching from the south at the time. T. 40.

The plaintiffs, Mr. and Mrs. Checketts were interrogated only as to their love and affection for their son, his comfort and companionship, the boy's nature, the fact that he was energetic and that it was expected by the parents that he would be of comfort and assistance to them. T. 99-103. Proof was submitted through the boy's school teacher in whose class he was enrolled at the time of his death, to the effect that he was a healthy, active boy, nicely behaved and intelligent. T. 80.

The school bus was plainly labeled with black letters on an orange background, and stated the name of the school district that operated the same. It was a large, orange colored bus, 7½ feet wide, 9½ feet in height and 32 feet in length. It was plainly labeled "School Bus" with the word "STOP" in large letters. T. 97-98

SUMMARY

The jury was selected by counsel for the respective parties after careful examination and the cause was tried and argued without any exception by either side as to the argument of counsel or as to the propriety of their conduct.

It was thoroughly understood and agreed in what amounted to practically a stipulation between counsel, that the jury was not entitled to permit their sympathy to in any way enter into the case and that the appellees were not entitled to any recovery for mental anguish, grief or suffering of the parents as the result of the loss of their child. Order denying motion for a new trial T. 22-23. By reason of the fact that there was complete accord between counsel for the respective parties as to the elements that the jury could properly consider, no record was made of this fact or of the voir dire examination, but as set forth in the court's order denying the motion for a new trial, counsel for the defendants repeatedly stated the correct rule of law to the jurors and they were advised that they could not consider mental anguish or grief, and this statement was acquiesced in and reiterated by counsel for the plaintiffs.

On page 4 of appellant's brief, under what is designated as Paragraph IV, mention is made of the fact that the defendant by its answer, pleaded that an action had been previously instituted in the State court and thereafter dismissed as to the Covey Gas and Oil Company. This answer, which was a seperate answer and defense, was the Sixth Defense of the appellant. T. 8-10. The appellees moved to strike

this defense, T.11, and the court T.12, struck the Sixth Affirmitive defense:

> "After hearing respective counsel, the motion as it pertains to the Fourth Affirmative Defense was overruled without prejudice, and granted as it pertains to the Sixth Defense."

No error is claimed as to this matter—it is not mentioned in either the appellant's Statement of Points, T.158-160, nor is it set forth in the appellant's Specifications of Error. Why it is referred to in the brief is not clear to counsel for appellees and apparently its only purpose could be to suggest to the appellate court that another action had been filed. However, in this connection, said Sixth Affirmative Defense, having been stricken by the trial court and no error having been predicated upon the trial court's ruling, we do not believe that any mention of it or of the pending action can be made. The facts concerning the other pending action are clear and undisputed and there could not be any disagreement as to those. We think that they militate strongly in appellees' favor here, but will not in any way refer to the same. If upon the oral argument of this matter before the appellate court, these matters are considered of importance, we will be glad to agree with counsel for appellant on the facts as to what has occurred.

The appellant's Specifications of Errors are found on pages 8 and 9 of their brief and are numbered from 1 to 8 inclusive. The specifications III, IV, V and VIII are based upon the proposition that the court erred in not granting a new

trial or reducing the amount of the verdict, and it is appellees' position that these Specifications cannot be considered by the appellate court.

Specification of Error No. VI is based on the proposition that the court erred in refusing to grant a new trial on the ground that the jury was not instructed, that they did not have the right to take into consideraion mental suffering and grief. The question of whether the jury was actually so instructed or actually so understood, was a question of fact in view of the examination of the jury and the statement of counsel, and being a question of fact, cannot be reviewed on appeal.

It is appellee's position that there is really only before the court, the question raised under Specification of Error No. VII, as to the bringing in of the defendant Ralph L. Bowman as a party.

Appellees take this position by reason of the fact that Specifications of Error I and II were submitted to the court on the motion for a new trial and that they are the same as the Specification of Error No. VI; each of these three Specifications complain that the jury should have been instructed, that they had no right to take into consideration mental suffering and grief. This matter having been submitted to the court in the motion for a new trial and the court in his order, having set forth what the facts actually were and that the jury was, as a matter of fact, advised by counsel for appellant that mental suffering and grief could not be considered—that this amounted to the same thing as the giving of the instruction and that the jury thoroughly understood the matter.

POINTS AND AUTHORITIES

I.

The rule of law as to the granting of a new trial, the amount of verdicts and excessive damages in the Federal Court is governed by the Federal Rules and decisions and not by the rules and decisions of the State Court.

Aetna Casualty & Surety Co. v. Yeatts, 4th Circuit, 122 Fed. 2d. 350.

Berry v. Edmunds, 116 U.S. 550, 29 L. Ed. 729.

Title Guarntee & Surety Co. et al v. State of Mo. ex rel. Stormfeltz, 105 Fed. 2d 496, Syllabus 8 and cases cited.

II.

28 U.S.C.A. Section 391 and cases cited thereunder.

Where the question of the excessiveness of a verdict is a matter of fact the appellate court cannot and will not consider whether a verdict is excessive or review the same where new trial denied.

Fairmount Glass Works v. Cub Fork Coal Co. 287 U.S. 474, 53 S. Ct. 254, 77 L. Ed. 439.

U.S. v. Socony Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L.Ed. 1129.

Scott v. Baltimore & Ohio R. Co. 151 Fed. 2d 61, 3rd Circuit.

Ross Engineering Co. v. Pace, 153 Fed. 2d 35—4th Circuit.

Pocohontas Distilling Co. v. U.S. 218 Fed. 782.

Houston Coco Cola Bottling Co. v. Kelly, 5th Circuit, 131 Fed. 2d 627.

Cleveland Nehi Bottling Works v. Schenk, 56 Fed. 2d 941.

Aetna Casualty & Surety Co. v. Yeatts 122 Fed. 2d 350.

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Counsel for Appellees at all times understood and agreed, and now understand and agree that the appellees could not recover any amount by reason of their mental anguish and grief in the loss of their child and counsel were at all times, careful and painstaking in not either asking any question or making any argument that could in any way give the impression that they took any other position.

IV.

Appellant, in specification of error, No. 2, Page 8 of their Brief, admit that the instructions of the court as to the elements that could be considered by the jury in arriving at a verdict if they found for the plaintiffs were and are proper and correct and only contend that the element with reference to mental anguish and grief should have been excluded by a specific instruction.

V.

Appellees do not question the authority of the trial court in the Federal Court to grant a new trial or reduce an excessive verdict, if the same is justified and if there are any

circumstances or facts set forth showing misconduct on the part of the jury or a failure to follow the court's instructions.

VI.

The failure to negative or give instructions as to matters that may not be considered by the jury as elements of damage is not error where all of the elements of damage are properly set forth and this is especially true where the general charge does not, by its language, permit a jury to consider any elements except those covered by the instruction and where as here the jury was instructed:

> "Your verdict must be based on evidence admitted as presented from the witness stand." T 145.

Bolino v. Illinois Terminal R. Co. (Mo.) 200 S.W. 2d 352.

Jenkins v. Wabash R. Co. (Mo.) 107 S.W. 2d 204, Certiorari denied, 302 U.S. 737, 58 S. Ct. 139, 82 L. Ed. 570.

Mo. Pac. R. Co. v. Bushey (Ark.) 20 S.W. 2d 614, Cert. denied 50 S. Ct. 245, 281 U.S. 728, 74 L. Ed. 1145.

Byram v. East St. Louis R. Co. 39 S.W. 2d 376.

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Webster Manufacturing Co. v. Mulvanny (Ill.) 48 N.E. 168.

Galveston H & S.A. R. Co. v. Heard et al (Tex) 91 S.W. 371.

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Houston & T.R. Co. v. Davenport (Tex.) 117 S. W. 790.

Griffith v. Midland Valley R. Co. (Kans) 166 Pac. 467.

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Gt. Western Coal & Coke Co. v. Coffman (Okla.) 143 Pac. 30.

Title 28 U.S.C.A. Section 2111, Chapter 139, Section 110 63 Stat. 105 (Printed at length on Page 19 this brief.)

Rule 61, Fed. Rules of Civil Procedure (Printed at Page 19 this brief.)

Section 5-907, Idaho Code (Printed—Page 19 this brief.)

Peterson v. Hailey Nat. Bank, 51 Ida. 427, 6 Pac. 2d. 145.

Hard v. Spokane Internat'l R. Co. 41 Ida. 285, 238 Pac. 891.

Bicandi et al. v. Boise-Payette Lumber Co. (Ida.) 44 Pac. 1103.

Park v. Johnson, 20 Ida. 548, 119 Pac. 52.

Austin v. Brown Brothers, 30 Ida. 167, 164 Pac. 95.

Tarr v. O.S.L.R.R. Co. 14 Ida. 192, 93 P. 957.

VII.

There was no error committed by the trial court in denying a motion to make Ralph L. Bowman a party thereto. The motion was dated and filed the first day of June, 1949, the date of the trial and the granting of the same would have resulted in a continuance.

Bull v. Santa Fe Trail Transportation Co., 6 F.R.D. 7

General Taxicab Association v. O'Shea (D.C.) 190 F.2d 671

ARGUMENT

GRANTING OF A NEW TRIAL AND THE AMOUNT OF VERDICT AND DAMAGES, ARE GOVERNED BY THE FEDERAL RULES AND PRACTICE.

The appellant necessarily proceeded under Rule 59 (a) of the Federal Rules of Civil Procedure when it asked the District Court to grant a new trial or to reduce the amount of

the verdict because it was excessive. The rule is well settled that the procedure in this respect is governed by the Rules of Civil Procedure and not subject in any way to the rules of state practice. Consequently, the Idaho cases cited in support of appellant's contention are not controlling or in point and this is likewise true as to California and other State court decisions concerning the amount of damages. In Etna Casualty & Surety Co. v. Yeatts, 4th Circuit, 122 F. 2d 350, the court said:

> "Motion to set aside the verdict and grant a new trial was a matter of Federal Procedure governed by Rule of Civil Procedure 59 and not subject in any way to the rules of State practice."
>
> "The motion for a new trial in the Federal Courts is addressed to the sound legal discretion of the trial judge and this proposition is universally recognized in the Federal Courts." Berry v. Edmonds, 116 U.S. 550, 29 L. Ed. 729

THE APPELLANT'S SPECIFICATIONS OF ERRORS III TO V INCLUSIVE AND SPECIFICATION NO. VIII, APPELLANT'S BRIEF, Pages 8 and 9, ARE NOT SUBJECT TO CONSIDERATION OR REVIEW BY THIS COURT. THESE SPECIFICATIONS REFER TO ERRORS IN DENYING A NEW TRIAL.

It is appellees' contention that in the instant case or in a case of like character where the question of the amount of damages and whether excessive or not, is one of fact and has been submitted to the trial court for review, that the appellate court cannot review the court's order.

In the instant case there is no question of impropriety of the jury, of counsel or of bias or prejudice committed.

> "In Fairmount Glass Works v. Coal Co. 287 U.S. 474, at page 481, 53 S. Ct. 252, 254, 77 L.Ed. 439, where inadequate damages were complained of, it was said, citing many cases: 'The rule that this court will not review the action of the federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a Circuit Court of Appeals.' "

In Houston Coco Cola Bottling Co. v. Kelly et al, 131 Fed. 2d 627, the court said:

> "* * a complaint of excessiveness in a verdict normally presents merely an error of fact and, therefore, nothing for appellate review. Southern Ry. Co. v. Walters, 8 Cir. 47 F. 2d 3. Said this court in Southern Ry. v. Montgomery, 5 Cir., 46 F.2d 990, 991: 'We have no jurisdiction to correct a verdict because it is excessive.' Cf. Swift & Co. v. Ellinor, 5 Cir. 101 F.2d 131. The duty of granting a new trial in a jury case for, or otherwise correcting, excessiveness in fact in a verdict, is exclusively that of the trial judge, and the granting or denial of a new trial on the ground of excessive damages is a matter of discretion with the trial court, not subject to review except for grave abuse of discretion. Department of Water & Power v. Anderson, 9 Cir., 95 F.2d 577; Natl. Surety Co. v. Jean, 6 Cir., 61 F. 2d 197; Chambers v. Skelly Oil Co., 10 Cir. 87 F.2d 853."

The above cases were approved by the U.S. Supreme Court in U.S. v. Socony Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129.

In the case of Scott v. Baltimore & Ohio R. Co. 151 Fed. 2d 61, the court, in construing a very large verdict said:

> "The members of the court think the verdict is too high. But they also feel clear that there is nothing the court can do about it."

> "While as triers of fact we should be inclined, if we agreed with the plaintiffs' testimony, to award a smaller sum, we think to do so here would be to pass the point which we, with propriety may reach."

We fail to see how, in view of the express holding and direction of the U.S. Supreme Court and of the different Circuit Courts of Appeal the appellant can expect this court to consider its specification of error with reference to the denial of its motion for a new trial or the matter of the amount of the damages.

The appellant's specification of error No. 6 (Page 9 of appellant's brief) under the circumstances of this case is not reviewable here. The question of the instruction on mental suffering and mental grief was a question of fact for the reason that there was no reason or necessity for giving this instruction, as it clearly appeared as a matter of fact that the jury fully understood that no allowance could be made for anguish and grief. The court in the order denying the motion for a new trial, clearly sets out the facts and inasmuch as there is no disputt concerning the matter, the appellant cannot ask for a review on this appeal.

The jury was properly instructed in accordance with the Idaho Statute and the verdict of the jury cannot be set aside even though the appellate court should consider that question as being governed by the statute and the Supreme Court decisions of the State of Idaho.

Section 5-311, Idaho Code provides:

> "In every action * * such damages may be given as under all of the circumstances of the case may be just."

Not a single case can be found in the Idaho Supreme Court decisions where a verdict has been reduced for excessiveness by reason of the death of a child. The Idaho Supreme Court has held unqualifiedly:

> "Determination of damages for wrongtful death of a child are peculiarly for the jury." Asmundi v. Ferguson, 65 Pac. 2d 713.

> "Before a verdict can be set aside on the ground of excessive damages, appearing to have been given under the influence of passion or prejudice, such fact must be made clearly to appear to the trial judge." Short v. Boise Valley Traction Co. 38 Ida. 593, 225 P. 398, also Ellis v. Ashton & St. Anthony P. Co. 41 Ida. 106, 238 P. 517.

> "Jury should use common sense and discretion in estimating what the services of a child is worth, and in parents' action for death of adult daughter, jury must estimate damages as best they can by reasonable probabilities and circumstances." Golden v. Spokane R. Co. 118 P. 1076; Butler v. Townend (Ida.) 298 P. 375.

In Hepp v. Ader, 64 Ida. 240, 130 P. 2d. 859 cited by appellant, the court said:

> "There is probably no subject about which there is greater discord in judicial opinion than with respect to the amount which should be awarded as damages for the death of a human being, caused by the wrongful act or negligence of another. The right to recover such damages is statutory, and much of this discord may be attributed to differences in laws granting it."

And at Page 248 the court states:

> "Fixing amount of damages to be awarded, in a case involving death by wrongful act or negligence, is the duty and responsibility of the jury. The rule is too well established to require the citation of authority, that an appellate court should never interfere with the vedict of a jury because of the amount of the award, except in cases where abuse of discretion is clearly apparent. In this case we find no evidence of abuse of discretion, nor is there anything in the record which suggests that the verdicts were given under the influence of passion or prejudice."

THE JURY WAS PROPERLY INSTRUCTED AND IT WAS NOT ERROR TO REFUSE THE INSTRUCTION AS TO MENTAL ENGUISH AND GRIEF.

There is no controversy as to the different elements that may be considered by a jury in arriving at a verdict in a case of this kind. Counsel for Appellees had no objection to the giving of an instruction with reference to mental anguish or grief but the matter had been so thoroughly agreed upon by counsel that the trial judge undoubtedly realized that the statement of counsel to the jury by both sides, was much more

effective and impressive insofar as the jury was concerned, than the giving of an additional instruction purely as a precautionary measure and which would not have in any way tended to clarify the matter.

The case is not unlike that of Bolino v. Illinois Terminal R. Co. (Mo.) 200 S. W. 2d 352. The identical question before the court here on the instruction was raised in that case. The only difference is that the argument of counsel in the Missouri case was in the record and counsel for defendant had stated to the jury the elements that could not be included or considered by them. No objection was raised to his argument and the apellate court said:

> "The giving of the instruction by the court would have been no more than a precautionary one which was in the court's sound discretion."

In Griffith v. Midland R. Co. (Kans.) 166 Pac. 467, the court, during the course of the trial, limited the effect of certain testimony, or advised the jury that it could only be considered as affecting the creditability of the witness. The opposing counsel asked for an instruction to this effect. It was denied, and the Supreme Court in discussing the matter, said:

> "Such a ruling given at the time would be more likely to instruct the jury as to limited scope and purpose of the evidence than the instruction requested merely as one of the thirty separate instructions prepared by the defendant and handed up to the court when the evidence was concluded."

It is clear in the instant case that the instructions given, could not possibly be construed as authorizing recovery for

mental anguish and while the appellant takes the position in one of their specifications that the instrucions are subject to this criticism, they fail to point out how the instructions used could have in any way led the jury to believe that they were to consider mental anguish and the court did instruct the jury:

> "Your verdict must be based on evidence admitted as presented from the witness stand." T.145.

When counsel for the respective parties agree on a matter in the presence of the jury and it is thoroughly understood, there can be no reason or occasion for any further instruction.

While it would not have been improper and even proper for the court to give the instruction requested, the failure to give it where the jury was fully instructed is not error and the court is not obliged to instruct specifically on all matters that may not be considered by the jury.

In Great Western Coal & Coke Co. v. Coffman, (Okla.) 143 Pac. 30, the trial court instructed the jury generally that in fixing the damage or compensation that the plaintiff was entitled to by reason of a death, that they could take into consideration the life expectancy, the contribution and support that he might give to the plaintiff, the wife and the infant children of the parties. The defendant requested an instruction that the jury could not take into consideration any grief, mental suffering, companionship or society. This requested instruction was refused. The court in passing on the matter said:

> "The idea was excluded from their minds that they might take into consideration anything else and clearly confined her damages to the money value of the life of the deceased. For the reason that the court thereby excluded the consideration of any other element of damage and there was no evidence of, or recovery sought, for grief, mental suffering or loss of society, it was not error to give said instruction, or to refuse to give instruction No. 11 requested by defendant."

In Tiffels v. Chicago Great Western R. Co. (Mo.) 219 S. W. 109, it was said:

> "Instruction No. VI carefully limited plaintiff's compensatory damages to loss of support and ministration to her physical needs and necessary comforts. By necessary implication it excludes damages for loss of society and mental suffering. The jury will not be presumed to have violated the terms of the instruction but to have followed it, where there is nothing anywhere in the case countenancing any other element of damage. It is not like a case where the elements of plaintiff's damages are submitted in general terms."

Missouri Pac. R. Co. v. Bushey (Ark.) 20 S. W. 2d 614 is squarely in point. Cert. Denied, 50 S. Ct. 245, 281 U. S. 728, 74 L. Ed. 1145. The Ninth Circuit in Northern Pacific R. Co. v. Freeman et al, 83 Fed. 82, held squarely against the appellant's contention with reference to the instruction requested. That case was reversed by the U. S. Supreme Court, but upon the ground that the evidence showed the plaintiff to have been guilty of contributory negligence and the holding on this instruction by the Circuit Court of appeals was not passed upon.

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Section 2111, Title 28, U. S. Code, Chapter 139, Sec. 110, 63 Stat. 105.

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Rule 61, Rules of Civil Procedure.

"The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect." 5-907 Idaho Code.

It is not contended that there is any error of commission, but one of omission. This is not a case of a court having given an erroneous instruction and it must be clear from the record and the order of the trial court in denying a new trial, that the jury could only have reached its verdict upon the proper theory:

"Where jury reached verdict upon proper theory appellants held not prejudiced by improper instructions." Peterson v. Hailey Nat. Bank, 51 Ida. 427, 6 Pac. 2d 145.

> "In this State a judgment will not be reversed where it appears that the jury took cognizance only of matters proper for their consideration even though erroneously instructed." Austin v. Brown Brothers, 30 Ida. 167, 164 P. 95.

The appellant cites and relies upon cases from the Texas courts and an analysis of the Texas cases can only result in a holding that they do not support appellant's contention. In the case of Gillett Motor Transport Co. v. Blair, (Tex.) 136 S.W. 2d, 656 appellant places reliance upon syllibi 3 and 5 but these clearly show that they are not applicable and the court in its discussion so indicates. The rule in Texas is that if the general charge is not subject to the construction that mental suffering and pain can be reasonably considered as matters that may be taken into consideration that it is not necessary to exclude them by specific instructions.

The leading Texas case requiring the giving of an instruction on matters to be excluded, is that of International and Great Northern R. Co. v. McVey, (Tex.) 87 S.W. 328. This case is analyzed and distinguished in both Galveston H. & S.A.R. Co. v. Heard et al (Tex.) 91 S.W. 371 and Texarkana and Ft. S.R. Co. v. Frugia (Tex.) 95 S.W. 563. The latter case is clearly in point in appellee's favor.

Appellant cites and relies on American R. Co. of Porto Rico v. Santigo et al, 9 F. 2d 753. This is the only Federal case cited in support of appellant's Specifications of Errors, I, II and VI, and under its Points and Authorities, found on Page 10 of the brief, and the decision does not support the assignment that it was error to not give the defendant's in-

struction as to pain and suffering. That point was not before the Circuit Court and the language with reference to mental anguish or pain and suffering is found in the language of the court in a suggestion as to the proper instruction to be given on a new trial. All that was held was that erroneous instructions were the law of the case insofar as the jury was concerned. There is not the slightest intimation in the decision that it would be erroneous to fully and properly instruct on the measure of damages as to the elements to be considered and to not instruct on those that were to be excluded or not considered.

Appellant also cites Humphrey v. Ash, 6 Atl. 2d 436. The court merely said the instruction should have been given, but the case was reversed because the general instructions did not state the proper rule with reference to damages and the facts are not applicable to the facts in the instant case. As heretofore referred to, all of the other cases cited in support of these Specifications of Error, are Texas cases.

IT WAS NOT ERROR TO DENY THE DEFENDANT'S MOTION TO MAKE RALPH L. BOWMAN A PARTY.

The motion to make Bowman a party, T. 12, was made solely upon the grounds that there could not be complete relief accorded between the parties to the action unless Bowman was made a party thereto. Inasmuch as appellant has not cited any Idaho authorities to the effect that there is any contribution between joint tort feasors; has not in any way

attempted to show any right of the defendant to contribution against Bowman, we take it that appellees are not under the burden of negativing this proposition.

However, there is no rule of law better settled than that there is no contribution between joint tort feasors, unless by statute, and certainly it is not contended by appellant that there is any contribution in Idaho as far as joint tort feasors are concerned, and certainly it is not and cannot be contended by the appellant that there is any rule of law better settled in Idaho than that a plaintiff may sue one or all joint tort feasors as the plaintiff elects.

In support of its assignment of error appellant cites one case that of Greenleaf v. Safeway Trails, 140 F. 2d 889. The decision as we read it, is squarely against the appellant's contention.

The case of General Taxicab Association v. O'Shea (D.C.) 190 F. 2d 671 lays down the rule. There are many decisions upon this proposition and it is well settled in tort actions that the defendant cannot compel the plaintiff to accept joint tort feasors as defendants unless the plaintiff is willing or so desires.

The plaintiffs' complaint was filed January 26, 1949 T. 5, and the answer was filed April 4, 1949, T. 10. The motion to bring Ralph L. Bowman into the case was made and filed June 1, 1949, was presented at the time the parties were ready for trial and the jury was to be called and immediately upon the denial of the motion, the court proceeded with the trial. T. 13.

The motion does not tender any complaint as to Bowman; does not ask that he be made either a party plaintiff or defendant and recites that it is based upon the records and files. The granting of the motion would clearly have continued the case for the term. There is no showing that the defendant contends or claims that Bowman is guilty of negligence or that there could be any contribution between the defendant and Bowman.

Surely error cannot be predicated upon a motion made and presented on the day set for trial and upon a motion that does not give any reason whatever why the plaintiffs could or should be forced to accept such a defendant.

CONCLUSION

The appellees proved the direct violation of the Idaho statute with reference to motor vehicles passing a school bus loading or unloading children. When the violation of this statute was proved, the defendant was negligent per se:

> "Any person or persons violating the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than $300 or imprisonment in the country jail for not more than six months." Section 48-1104 Idaho Code Annotated, 1932.

It was also proved that the school bus was plainly labeled with the number of the school district:

> "Every truck, bus or other vehicle, used by a school district to transport children to or from school, shall be labeled with the number of the school dis-

> trict by whose authority it is being used or employed at the time." Section 48-1102, Idaho Code Annotated, 1932.

The bus was 7½ feet wide, 9½ feet high, 32 feet in length. On the back it had the word "STOP" "SCHOOL BUS." On the side was written "INDEPENDENT SCHOOL DISTRICT NO. 1" in black letters. The bus was orange in color and was plainly marked "INDEPENDENT SCHOOL DISTRICT NO. 1", T. 97-98. It was shown by the testimony of the sheriff of Bannock County, Mr. Marley, that the school bus, when stopped at the place of the accident, could be plainly seen from a distance of 6/10ths of a mile. T. 87.

The evidence is undisputed that at the time of the accident, the driver, Ralph L. Bowman was driving in excess of 35 miles per hour and at that time, under the Idaho Statute, Section 48-504, Idaho Code Annotated, the same insofar as it was applicable, provided as follows:

> "Any person driving a vehicle on a highway, shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person.
>
> "* * It shall be prima facie lawful for the driver of a vehicle to drive the same at a speed not exceeding 35 miles per hour. It shall be prima facie unlawful for any person to exceed the foregoing speed limitation."

The court gave the defendant the benefit of not instructing on this phase of the statute and plaintiffs were entitled to an instruction that a violation of the statute was prima facie negligence. Also, the driver, Ralph L. Bowman, having been assistant manager for the Covey Gas & Oil Co. T. 28, the plaintiffs were entitled to an instruction as to punitive damages. The defendant was also given the benefit of any doubt in this respect and the court refused to instruct as to punitive damages, and in its instructions, specifically limited the plaintiff to general damages and the amount prayed therefore in the complaint.

We refer to these matters for the purpose of showing that the defendant's rights were at all times carefully protected, not only by its counsel but by the court, and the appellant had a fair trial.

Certainly the killing of Gary Checketts occurred while the defendant's driver was in direct violation of the law as to stopping for a school bus, as to operating his automobile in a careful and prudent manner and as to exceeding the statutory speed at the time of the accident. (Certain additions and amendments having been made to the Idaho Motor Vehicle Act and with reference to school busses, we have referred to the Idaho Code Annotated to avoid any confusion.)

Certainly the actions of the driver were wanton, reckless and showed gross negligence and indifference on his part. The Idaho Supreme Court in Ellis v. Ashton & St. Anthony Power Co., 41 Ida. 106, 238 P. 517, without any claim for punitive damages, referred to the fact that the construction of the

pole line by the defendant in that case was wanton and careless and specifically held that this matter could be considered by the jury.

In this connection we call the court's attention to two Kentucky cases:

> "The final contention is that the verdict is not sustained by sufficient evidence, and is contrary to law. We do not so regard it. Statutes have been enacted in an effort to procure the prudent operation of automobiles. These statutes should be observed. When men are employed to operate automobiles, care should be exercised to select prudent and careful men, and, when men are employed who are not such, responsibility must follow." Dulaney et al v. Sebastian's Administrator, 39 S.W. 2d 1000.

> " 'it is only by imposing vicarious liability upon employers that such vigilance can be secured in the supervision of the men in their empolyment, as is needed, to protect others. It is only by such a rule that employers can be forced to weed out the reckless and the incompetent.' " Bowen v. Gradison Construction Co., 236 Ky. 270, 32 S.W. 2d 1014, 1019. The judgment is affirmed.

The legislature of the State of Idaho has attempted to protect school children who are under the necessity of riding to school in busses and who are required by law to attend the public schools. All of the other drivers of motor vehicles, of which there were at least some four or five, saw this large, brightly colored school bus and stopped. A state patrolman, or traffic officer was approaching the scene of the accident. He saw the bus from a distance of some half mile away; saw

the cars behind it and was approaching the bus from about th esame distance back of it as Bowman was approaching from the other direction, T. 68-69. This patrolman saw the blinker light on the back of the school bus, plainly blinking. T. 73. There is not the slightest hint or claim that any of the eye witnesses to this accident were other than disinterested.

In the examination of both Mr. and Mrs. Checketts, they were questioned only as to those matters that were proper. There was no objection made as to the propriety of the questions concerning the son's characteristics or as to the fact that he was energetic and that he was an affectionate child.

There was not a single objection interposed to any questions asked Mrs. Checketts, T. 101-104.

Surely the parents in this case should not be required to retry the same unless there is some substantial showing made that something grossly irregular or unfair occurred during the trial.

The foreman of the jury, Mr. Larsen was a man who had retired from the oil business and had formerly not only operated an oil truck or tanker on the road, but had been a distributor of petroleum products. He was a conservative man and a man of means. One of the jurors, Mr. Ray J. Eskelson the manager of a large department store in a group of chain stores. Mrs. Clara Jones was the wife of a prominent and well-to-do sheep man.

All of the jurors were substantial, conservative people and there is nothing in the record to show any irregularity of any kind.

It is argued that the case is one to excite the sympathy of a juror, and we say unhesitatingly that surely the case and the circumstances here excite the sympathy of any court and of counsel for both appellant and appellees, but certainly the plaintiffs are not to be deprived of a right to try their case because the actions of the defendant were wanton. Evidently the Legislature of the State of Idaho that adopted the statute with reference to school busses, was sympathetic to children and they did everything in their power to avoid just such an accident as occurred here.

If the jury system is to be maintained, by what logic can it be said that the jury can be instructed that they must base their verdict upon the evidence produced from the witness stand; that they can render a verdict in any amount they find just, not exceeding that prayed for in the complaint and after they have rendered their verdict on the evidence that the courts can and will say to them:

"Your verdict is not correct or is excessive," and that the court will base its judgment upon decisions of courts in other states and other cases when by so doing the court is accepting evidence not submitted to the jury. If the verdict of the jury is going to be changed in such a manner, then the jury should be advised by the court or evidence should be introduced showing what other courts have approved in like cases.

If the case were to be re-tried the same instructions would be given the jury and the court would not fix any ceiling upon the amount of their verdict except the amount prayed

for in the complaint. To follow such a rule is demoralizing to the jurors and they are not so uninformed or so naive as not to know the basis of the decisions when their verdicts are set aside. This sort of reasoning and procedure creeps into the jury room and jurors with experience argue pro and con, not what the evidence shows the damage to be and what is reasonable, but what amount an appellate court is likely to uphold and this is well known to the courts and the attorneys.

We submit that the verdict of the jury and the judgment entered thereon must be affirmed.

RESPECTFULLY SUBMITTED:

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